

No. 75-1508

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

**FEDDERS CORPORATION,
PETITIONER**

v.

FEDERAL TRADE COMMISSION

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**BRIEF FOR THE FEDERAL TRADE COMMISSION
IN OPPOSITION**

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OPINIONS BELOW

The court of appeals' opinion (Pet. App. 69a-78a) is reported at 529 F.2d 1398. The order and opinion of the Federal Trade Commission (Pet. App. 58a-68a) and the initial decision and order of the administrative law judge (Pet. App. 16a-57a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1976. The petition for a writ of certiorari was filed on April 19, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a Federal Trade Commission order prohibiting any misrepresentation with respect to the air

(1)

cooling, dehumidification or circulation characteristics, capacity or capabilities of air conditioners was reasonably related to the Commission's finding that petitioner had misrepresented that its air conditioners were superior in cooling capacity to other air conditioners.

STATUTE INVOLVED

Section 5(a) and (b) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45(a) and (b),¹ provide in part:

(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

* * * * *

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

* * * * *

(b) * * * If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall * * * issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice.

¹Section 5(a)(1) and (6) have been amended to apply to conduct "affecting" as well as "in" commerce (see 15 U.S.C. (Supp. IV) 45(a)(1) and (6)), but this case is based on the law as it stood prior to the amendment.

STATEMENT

In June 1973, the Federal Trade Commission issued a complaint alleging that petitioner, a corporation engaged in the sale of home air conditioners, had engaged in unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act (Pet. App. 1a-9a). The administrative law judge determined that petitioner had violated the Act by falsely representing in its advertising that "only" Fedders had "reserve cooling power," a feature stipulated to be the capacity to cool efficiently at times of high heat and humidity. Moreover, the judge found that through such advertising petitioner misrepresented directly or by implication that its air conditioners had a "significantly superior ability to function satisfactorily under conditions of extreme heat and humidity" (Pet. App. 52a-54a).

The judge ordered petitioner to cease and desist from misrepresenting any performance attribute of the products it sold or offered for sale (Pet. App. 55a-57a). On appeal, the Commission adopted the opinion of the administrative law judge but modified the order by prohibiting misrepresentation of only the air cooling, dehumidification or circulation characteristics of air conditioners (Pet. App. 58a-68a).

The court of appeals affirmed and enforced the Commission's order (Pet. App. 69a-78a). The court sustained the Commission's finding that the explicit claim of uniqueness also implicitly represented the performance characteristics of the products, and held that the Commission had properly prohibited misrepresentations that were implicit in, and hence reasonably related to, the false claim explicitly made (Pet. App. 76a).

ARGUMENT

1. Petitioner acknowledges that the Commission has discretion to "fence in" one found to have engaged in a wrongful practice by prohibiting other conduct having

a "reasonable relationship" to such wrongful practices (Pet. 6, 12). See generally *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 392-395; *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 428-431; *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 473; *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 611-613. Thus, as petitioner concedes, the only question concerns "the application of" settled principles governing the permissible scope of Commission orders (Pet. 6) to the particular facts of the case. The court of appeals affirmed the Commission's exercise of its broad remedial discretion, and this narrow question does not warrant further review.

2. In any event, the court of appeals was correct in sustaining the Commission's order. Petitioner claims in essence that it misrepresented only the uniqueness and not the actual performance characteristics of its products, and that the Commission's remedial powers are, therefore, limited to prohibiting misrepresentation of uniqueness (Pet. 7-10). But its claim of unique cooling power implies to consumers superior ability to perform. Limiting the Commission's remedial power on the basis of semantic distinctions between claims of uniqueness and claims of performance would seriously circumscribe the Commission's ability to provide practical protection for consumers under Section 5 of the Federal Trade Commission Act.

A consumer may be as deceived by misrepresentations that an asserted characteristic is unique as by representations that a product has a characteristic which in fact it does not. Cf. *Federal Trade Commission v. Colgate-Palmolive Co.*, *supra*, 380 U.S. at 380, 389. As the court of appeals noted, such a conclusion is "in the very realm of the Commission's greatest expertise—what constitutes deception in advertising" (Pet. App. 76a). The Commission

acted well within its discretion in concluding that such representations are reasonably related and that, having engaged in one form of such misrepresentation, petitioner should be restrained from engaging in such others. "[T]he Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past" (*Federal Trade Commission v. Ruberoid Co.*, *supra*, 343 U.S. at 473).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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